

*United States Court of Appeals  
for the Second Circuit*



**APPENDIX**



UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-v-

MICHAEL GARDNER,

Appellant.

B  
B/S  
76-1139

APPENDIX TO BRIEF FOR  
APPELLANT MICHAEL GARDNER

Appeal from A Judgment of  
Conviction in The United  
States District Court For  
The Southern District of  
New York

VOLUME IV

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TABLE OF CONTENTS

VOLUME IV

Court's Charge.....A 191

1 m 2

3392

Charge

2 THE COURT: Mrs. Altbush, Ladies and Gentlemen  
3 of the Jury, counsel for the government and counsel for  
4 the defendants: my charge is somewhat lengthy. There  
5 are at least five statutes which I must discuss, and even  
6 some subdivisions of statutes. So somewhere about midway  
7 through we will interrupt and take another breather.

8 Let me first thank all of you for what I  
9 consider, and I think the attorneys consider, to be a  
10 very conscientious service as jurors in this case.  
11 There have been many documents introduced. You have  
12 heard from many, many witnesses. We all know that this can  
13 exact some toll. People who must sit for hours in a jury-  
14 box and listen, watch -- you don't even have the advantage  
15 which I have, which is to stand and pace back and forth  
16 once in a while -- we know that this demands sacrifice  
17 from you, aside from personal sacrifices. So we all  
18 express our thanks to you for your diligent service, your  
19 patient, conscientious service here as jurors. This is  
20 important, as the attorneys have stated, because this is  
21 a matter of great concern both to the government and to  
22 each of the defendants here. This matter warrants the  
23 attention that you have given to it up to this point.  
24 I ask you to give me a similar amount of attention as I  
25 undertake to instruct you as to the law which is applicable

1 mp3

2 in this case.

3 Before doing that, I wish to thank the attorneys,  
4 who, in my view, have demonstrated great professional  
5 skill and competence and dedication with respect to their  
6 respective clients in their respective positions.

7 First, I will point out some general principles  
8 to you as to your duties, as to what you may and may not  
9 consider during your deliberations. It is the Judge's  
10 function to instruct you as to the law, the law which  
11 is applicable in this case. It is your duty to accept  
12 the law as I state it to you, and it is your duty to apply  
13 the law to the facts as you find those facts to be during  
14 your deliberations. I ask you not to single out any one  
15 instruction alone as stating the law, but consider the  
16 instructions as a whole. The logical result of your  
17 application of the law to the facts which you find in this  
18 case should be a verdict of guilty or a verdict of not  
19 guilty with respect to the various counts with respect  
20 to the defendants.

21 You are the sole and exclusive judges of the  
22 facts in this case. You pass upon the weight of the  
23 evidence; you determine the credibility of the witnesses;  
24 you resolve such conflicts as there may be in the evidence;  
25 you draw such reasonable inferences as may be warranted

1 mp4

3394

2 by the testimony and the exhibits in this case.

3                   With respect to any matters of fact, it is  
4 your recollection and yours alone which governs.

5 Anything that the attorneys for the government or for the  
6 defendants may have said with respect to any matters in  
7 evidence, or as to any factual matters, is not to be  
8 substituted for your own independent recollection of the  
9 evidence or the facts in this case. You are not to assume  
10 that I have any opinion as to whether either defendant  
11 is guilty or not guilty, or as to the truth or falsity  
12 of the charges asserted in this indictment. The fact  
13 that I have asked questions, denied motions, or granted  
14 motions in the course of this trial is not to be taken  
15 by you as an indication that either defendant is believed  
16 by the Court to be guilty or not guilty. Further, counsel  
17 have the right on the offer of certain evidence to press  
18 legal objections, and in so doing they are simply per-  
19 forming their duty.

20                   In your deliberations to determine the facts  
21 and whether the government has established the elements  
22 of the crime charged, you are to consider solely the  
23 testimony which you have heard from the witnesses, any  
24 stipulations of fact that the lawyers have agreed upon,  
25 any exhibits which have been received into evidence,

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3395

2 including any tapes. You are to consider even any lack  
3 of material evidence. But nothing else.

4 I have told you earlier in the trial that  
5 certain evidence was being received subject to connection.  
6 I have instructed you that with respect to certain of the  
7 evidence I did not find it to be connected and that you are  
8 not to consider it for any purpose. It has been stricken  
9 as evidence. But I also instructed you that with  
10 respect to certain other such evidence I have found that  
11 it has been connected and thus it may be considered by you  
12 along with all the other evidence in this case. Please  
13 remember that this ruling does not in any way represent  
14 a finding by this Court as to what the facts are - that  
15 determination must be made by you, the jury. I have  
16 simply ruled that the evidence in question may now be  
17 considered by you as you perform your function of deciding  
18 what the facts are.

19 You will recall that I have admitted certain  
20 evidence of absent persons, such as acts and statements  
21 of Miss Braunig. You may consider such evidence first  
22 in determining whether such persons were participants in  
23 any scheme charged in the indictment which you find to  
24 exist.

25 Further, when people enter into a joint scheme

1 mp6

3396

2 to accomplish an unlawful end, they become agents for one  
3 another in carrying out the scheme. Hence, the acts or  
4 declarations of any one of them in the course of the scheme  
5 and in furtherance of the common purpose are deemed to be  
6 the acts of all, and all are responsible for such acts.

2                   Accordingly, if you find in accordance with  
7 these instructions that one or more of the schemes to  
8 defraud charged in the indictment existed, then acts done  
9 and statements and declarations made in furtherance of  
10 that scheme or schemes by any person found by you to have  
11 knowingly been a member of the scheme may be considered  
12 against any defendant that you find was also a member,  
13 even though such acts or declarations were made in the  
14 absence and without the knowledge of that defendant.  
15  
16 It is important to note that this principle applies only  
17 to the acts and declarations done or made during the  
18 continuance of the scheme and in furtherance of the scheme,  
19 that is, to carry out an unlawful objective or purpose of  
20 the scheme. It does not apply to acts or declarations  
21 which do not have each of these characteristics.

22                   The indictment in this case contains 13 counts.  
23 Michael Gardner is named as a defendant in each of the 13  
24 counts. Sy Guthrie is named as a defendant in six of the  
25 counts. I will explain more about the structure of the

1 mp7

3397

2 indictment as we move along.

3                   In the determination of whether a defendant is  
4 guilty or not guilty of the crimes charged, you must  
5 remember that guilt is personal and that the determination  
6 of whether each defendant is guilty or not guilty must  
7 be determined solely on the evidence admitted as to the  
8 defendant you are considering. You are not to consider  
9 evidence which was admitted solely as to one of the  
10 defendants in determining whether the other defendant is  
11 guilty or not guilty of the crimes charged.

12                  As you approach the performance of your function  
13 in this case, that is, the determination of whether each  
14 defendant is guilty or not guilty, please remember that  
15 it is your duty to weigh the evidence calmly and dis-  
16 passionately, without sympathy or prejudice for or against  
17 either party. The fact that the government is a party here  
18 or that the prosecution occurs in the name of the United  
19 States of America entitles it to no greater consideration  
20 than that accorded to any other party to this case, and,  
21 by the same token, it is entitled to no less consideration.  
22 All parties, government and individuals alike, stand equal  
23 before the law.

24                  Each of the defendants on trial here has pleaded  
25 not guilty to the counts with which he is charged. Con-

1 mp8

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2 sequently, if either defendant is to be convicted, the  
3 government has the burden of proving each and every element  
4 of the crimes charged against him beyond a reasonable  
5 doubt. The burden of proving guilt beyond a reasonable  
6 doubt never shifts: it remains upon the government throughout  
7 the trial. The law never imposes on a defendant in a  
8 criminal case the burden of calling any witness or  
9 producing any evidence.

10 You may draw no unfavorable inference against  
11 a defendant because he did not take the stand and testify.  
12 In addition, you may not speculate as to why a defendant  
13 chooses not to testify. Nor may you speculate as to  
14 what a defendant might have stated had he chosen to testify.  
15 In every criminal case there is a constitutional rule which  
16 every defendant has a right to rely on: it is the rule that  
17 no defendant is compelled to take the witness stand.  
18 It is the prosecution which must prove a defendant guilty  
19 as charged beyond a reasonable doubt. A defendant is not  
20 required to disprove anything; he is not required to establish  
21 his lack of guilt. Also, a defendant has no obligation to  
22 call any witnesses on his own behalf or offer any evidence  
23 whatsoever. In short, it is up to the government to  
24 prove beyond a reasonable doubt every element of the  
25 crimes charged in the indictment.

1      mp9

2                    Each defendant is presumed to be not guilty  
3                    of the accusations contained in the indictment and this  
4                    presumption continues throughout the trial, and even  
5                    during the course of your deliberations in the jury-  
6                    room. So, the presumption of innocence is sufficient to  
7                    acquit a defendant of a crime charged, unless it is over-  
8                    come by evidence that satisfies your mind beyond a reasonable  
9                    doubt of that defendant's guilt. Unless you are so satis-  
10                  fied as to either defendant, it is your sworn obligation  
11                  to find that defendant not guilty. If you are so satis-  
12                  fied as to either defendant, it is your sworn obligation  
13                  to find that defendant guilty.

14                  And so the question arises, what is a reasonable  
15                  doubt? It is a doubt which a reasonable person has after  
16                  carefully weighing all the evidence, the kind of a doubt  
17                  which would make you hesitate to act in the most important  
18                  affairs of your own life. Reasonable doubt is a doubt  
19                  which appeals to your reason, your judgment, your common  
20                  sense, and your experience. It is not caprice, or whim,  
21                  or speculation; it is not an excuse to avoid the performance  
22                  of an unpleasant duty. Nor is it sympathy for any party.

23                  If after a fair and impartial consideration  
24                  of all the evidence, or lack of evidence, you can honestly  
25                  say that you do not have an abiding belief as to a defendant's

1       mp10

2       guilt, then you have a reasonable doubt, and it is your  
3       duty to acquit the defendant you are considering. On  
4       the other hand, if after a fair and impartial consideration  
5       of all the evidence you can honestly say that you do have  
6       an abiding belief as to a defendant's guilt, then you have  
7       no reasonable doubt, and it is your duty to convict the  
8       defendant you are considering.

9               A reasonable doubt does not mean positive  
10       certainty beyond all ~~possible~~ doubt. The law in a criminal  
11       case is that it is sufficient if the guilt of a defendant  
12       is established beyond a reasonable doubt, not beyond all  
13       possible doubt.

14               From time to time you may have heard reference  
15       made to direct evidence and to circumstantial evidence.  
16       Let me explain the difference between the two.

17               Direct evidence is where a witness testifies  
18       to what he saw, heard or observed, what he knows of his  
19       own knowledge, something which comes to him by virtue of  
20       his senses. That is direct evidence.

21               Circumstantial evidence is evidence of facts  
22       and circumstances from which one may infer connected facts  
23       which reasonably follow in the common experience of man-  
24       kind. Stated somewhat differently, circumstantial  
25       evidence is a fact or a series of facts in evidence which

1       mpl1

3401

2       have a logical tendency to lead the mind to a conclusion  
3       that another fact exists, even though there is no direct  
4       evidence to that effect.

5               Let me give you a brief example. If when you  
6       filed out during a recess all of the windows in this  
7       courtroom were closed and all the window sills beneath  
8       them were dry, and then, after a 10 or 15-minute recess  
9       you returned to the courtroom and all of the windows were  
10       still closed, but as you looked out you saw that it was  
11       raining, whereas previously it had not been, and if you  
12       saw that there was water on those sills upon your return,  
13       you could conclude that someone had opened the windows  
14       and that the rain had come into the courtroom and fallen  
15       upon the sills. Now, you would arrive at this conclusion  
16       from circumstantial evidence. In other words, you would  
17       infer on the basis of reason and experience from one or  
18       more established facts, the existence of some further  
19       fact.

3       20       A conviction may not rest upon suspicious  
21       circumstances alone. However, circumstantial evidence,  
22       if believed, is of no less value than direct evidence,  
23       for in either case you must be convinced beyond a reasonable  
24       doubt of the guilt of the defendant you are considering.

25               There are times when different inferences may

1       mpl2

3402

2       be drawn from the same facts, whether proved by direct or by  
3       circumstantial evidence. The government asks you to draw  
4       one set of inferences, a defendant asks you to draw another.

5           It is for you, and you alone, to decide what  
6       reasonable inferences you choose to draw from the evidence  
7       in this case. Indeed, it is your duty to determine the  
8       reasonable inferences to be drawn from the facts as you  
9       find these facts to be from the evidence. But you may not  
10       indulge in guesswork or speculation.

11           Now, there are a number of factors which are not  
12       evidence in this case and which you may not, under any  
13       circumstances, consider during your deliberations. Let  
14       me say that a question put to a witness is never evidence;  
15       it is only the answer which is evidence. Further, if  
16       during the course of the trial a question was asked and  
17       an objection was interposed, and I sustained the objection,  
18       you are to disregard the question and any alleged facts  
19       contained in the question. If there was an answer to the  
20       question, you are also to disregard the answer.

21           Similarly, if I ruled that an answer be stricken from the  
22       record, you are to disregard the answer and the question  
23       in your deliberations. They are not evidence and,  
24       therefore, cannot be considered by you in any respect.

25           Also, as I told you at the beginning of this

1       mp13

3403

2       trial, an indictment is not evidence. It is simply a  
3       procedure by which persons accused by a grand jury of  
4       crimes are brought to trial. Whether a person so  
5       accused is guilty or not guilty of the crimes charged is  
6       determined by a trial jury, such as you.

7       In addition, during this trial you have heard  
8       testimony from the defendant Gardner that he is presently  
9       incarcerated and has been incarcerated since May of 1975.  
10      I instruct you in this regard the primary reason for Mr.  
11      Gardner's present incarceration is not related to the  
12      charges in this case and that his incarceration is not to  
13      be considered by you for any purpose in considering the  
14      evidence in this case or in your deliberations.

15      Also, there is another person, Susan Braunig,  
16      named in the indictment who is not on trial here. You  
17      are not to consider her absence as evidence of any kind  
18      for any purpose. She may be absent for a variety of  
19      reasons, and the disposition of the indictment with respect  
20      to her is of no concern to you as jurors. You are not  
21      to speculate as to the reason why she is not on trial here.

22      Lastly, I shall tell you that, as you are well  
23      aware, there have been several occasions during the course  
24      of this case for the lawyers to confer with the Court out  
25      of your hearing. You are not to speculate as to what was

1                   mpl4

2                   being discussed. Such conferences have been held at the  
3                   bench to avoid you listening to arguments on questions  
4                   of law, which concerned only counsel and the Court.

5                   Certain of the evidence in this trial was  
6                   admitted by way of tape recordings of certain alleged  
7                   conversations. I instruct you that evidence admitted  
8                   by means of tape recordings is entitled to no greater  
9                   and no less weight than evidence admitted by any other  
10                   means.

11                   Now, during the course of the trial you were  
12                   given transcripts of the tape recordings as an aid to your  
13                   hearing of the evidence on the tapes. The tapes are  
14                   evidence in this case; the transcripts, except for those  
15                   few admitted into evidence, are not. They were only  
16                   to aid you in your hearing of the tapes. Therefore, if the  
17                   transcripts appeared to you to vary from the tapes in any  
18                   respect, it is your hearing of the tapes that governs.  
19                   You, the jury, must determine as the trier of the facts,  
20                   what was said in the conversations for which tape  
21                   recordings were offered into evidence.

22                   You, as jurors, are the sole judges of the  
23                   credibility of the witnesses and the weight their testimony  
24                   deserves. You know, of course, that there is no automatic  
25                   way to decide who is telling the truth and who is not.

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3405

2       Credibility can be equated with believability. If a witness  
3       is credible you say he or she is believable.

4               You should carefully scrutinize all the testimony  
5       given, both on direct and cross-examination, the circum-  
6       stances under which each witness has testified, and  
7       every matter in evidence which tends to show whether a  
8       witness is worthy of belief. Consider the witness's  
9       ability to observe the matters as to which he or she has  
10      testified, and whether the witness impresses you as having  
11      had an accurate recollection of these matters.

12              A witness may be discredited or impeached by con-  
13       tradictory evidence, or by evidence that at other times  
14       the witness made statements inconsistent with the witness's  
15       present testimony. If you believe that any witness has  
16       been impeached and thus discredited, it is your exclusive  
17       province to give the testimony of that witness such  
18       credibility, if any, as you may think it deserves.

19              When judging credibility, consider any relation  
20       any witness may bear to any side of the case, the manner  
21       in which each witness might be affected by the verdict,  
22       and the extent to which, if at all, each witness is either  
23       supported or contradicted by other evidence in the case.  
24       If you find that any witness has wilfully testified falsely  
25       as to any material matter, you may reject the entire testi-

1       mpl6

3406

2       mony of the witness, or you may accept such portion of it  
3       as you believe to be true.

4           In this case the defendant Gardner has taken  
5       the stand. There is no compulsion or obligation upon a  
6       defendant to testify, as I have said. Bu- when a defendant  
7       does take the stand and does testify, he is tested by all the  
8       same rules and guides that any other witness is tested by.  
9           You know, of course, that a defendant is interested,  
10       vitally interested, in the outcome of the case. Interest  
11       is a factor that you must take into consideration when  
12       assessing the testimony of any witness, whether presented  
13       by the government or the defense. In this regard, let me  
14       note that there has been evidence in this case of the  
15       defendant Gardner's prior convictions. With reference to  
16       this, I charge you that such evidence is not to be con-  
17       sidered by you as evidence of a criminal character on the  
18       part of the defendant, or as evidence of a disposition to  
19       commit the crimes charged in the indictment here. Th  
20       evidence may be considered by the jury insofar as it may  
21       affect the credibility of the defendant as a witness.  
22           Further, you may consider this evidence as bearing on the  
23       question of whether or not the defendant Gardner attempted  
24       to mislead Ross Allen with respect to these matters in  
25       issue.

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2 The rules of evidence ordinarily do not  
3 permit witnesses to testify as to opinions or conclu-  
4 sions. An exception to this rule exists as to those  
5 whom we call expert witnesses. Witnesses who by  
6 education and experience have become expert in some  
7 science, profession or calling may state their opinions  
8 as to relevant and material matter in which they pro-  
9 fess to be expert and may also state their reasons for  
10 the opinion.

11 In this case, one witness, Donald Stangel,  
12 was presented by the government as a handwriting expert.  
13 Your role in adjudging credibility applies to experts  
14 as well as to any other witness. You should consider  
15 the expert opinion received in evidence in this case  
16 and give it as much or as little weight as you  
17 think it deserves. If you should decide that the  
18 opinion of an expert is not based upon sufficient educa-  
19 tion or experience or if you should conclude that the  
20 reasons given in support of the opinion are not sound  
21 or that the opinion is outweighed by other evidence  
22 or that the trustworthiness of the expert or his  
23 credibility is questionable for some other reason,  
24 including the reason of relationship to one party or  
25 the other, then you may disregard the opinion entirely.

1 gwa2

2                   If it is specially within the power of the  
3 prosecution or defense to produce a witness who could  
4 give material testimony on an issue or to produce  
5 other evidence, the failure to call the witness may  
6 give rise to an inference that the evidence would be  
7 unfavorable. You cannot draw any such inference with  
8 regard to a witness or an exhibit that is equally  
9 available to both parties, or where the witness' testi-  
10 mony would be merely cumulative.

11                  I remind you again that a defendant is  
12 under no obligation to offer any evidence whatsoever.

13                  With regard to all witnesses, the ultimate  
14 question for you to decide in passing on the credibility  
15 of a witness is did the witness tell the truth before  
16 you. It is for you to say whether a witness' testi-  
17 mony at this trial was truthful or untruthful in whole  
18 or in part.

19                  Now, this completes my general instruc-  
20 tions with regard to what your duty and function is  
21 and with regard to what you may or may not consider  
22 in your deliberations. I am going to turn now to  
23 a discussion of the specific charges against the de-  
24 fendants and instruct you as to what essential elements  
25 the government must prove beyond a reasonable doubt

3409

1 gwa3

2 in order to sustain the charges against each defendant.  
3

4 Let me first briefly discuss the structure  
5 of the indictment. It is a lengthy indictment.  
6 So first I am going to discuss the structure of the  
7 indictment. Then I am going to read a number of  
8 pages from the indictment and, where I can, summarize  
9 some of the counts. Following that, if you wish,  
10 we can take a break.

11 The indictment is in several parts.

12 The first part is an introduction. It is characterized  
13 as an introduction.

14 This describes in general terms the structure  
15 of various transactions which the government alleges  
16 were schemes and artifices to defraud devised by one  
17 or more of the defendants together with others in order  
18 to defraud or falsely obtain money from various per-  
19 sons or businesses. The introduction describes some  
20 of these transactions as advance fee schemes, certain  
21 of which are charged against both the defendants and cer-  
22 tain of which are charged against the defendant Gardner  
23 only. It describes other of the transactions  
24 which are charged against the defendant Gardner only as  
25 fraudulent bank schemes and as a fictitious names and

1 gwa4

2 titles scheme.

3                   The second part of the indictment con-  
4 sists of 12 so-called fraud counts. As I have told you  
5 before, the defendant Gardner is charged in each of  
6 these counts. The defendant Guthrie is charged as  
7 a co-defendant in six of the counts. The crime  
8 charged in each count is doing an act or causing or  
9 aiding and abetting someone else to do an act such as  
10 using interstate wire facilities, using the mail or  
11 inducing travel in interstate commerce in order to  
12 execute one of the alleged unlawful schemes to defraud.

13                   And the third part of the indictment con-  
14 sists of the so-called fictitious names and titles  
15 count, count 13.

16                   In this count, the defendant Gardner is  
17 charged with having used or having aided and abetted  
18 Miss Braunig in the use of fictitious names and titles  
19 in furtherance of the alleged unlawful mail or wire  
20 fraud schemes charged in earlier counts and in further-  
21 ance of an alleged unlawful scheme to defraud retail  
22 stores, banks and other commercial enterprises.

23                   With regard to each of the crimes charged,  
24 I will separately discuss with you the elements which must  
25 be proved by the government beyond a reasonable doubt

3411

1 gwa5

2 before either defendant may be found guilty on any  
3 count. Before doing so, however, I am going to  
4 partially read and partially summarize the indict-  
5 ment for you.

6 Now, you may very well have some difficulty  
7 in remembering the precise wording of these counts,  
8 or some of these summaries of counts, so I plan to  
9 send into the jury room, once you commence your de-  
10 liberations, a copy of the indictment.

11 Please remember that an indictment is not  
12 evidence. An indictment is a method or a procedure  
13 whereby persons are accused of crimes by a grand jury,  
14 but it is not evidence.

15 The United States of America vs. Michael S.  
16 Gardner, also known as S. Michael Gardner and as S. M.  
17 Gardner, Susan M. Braunig, also known as Mrs. Susan  
18 M. Gardner and as S. M. Gardner, and Sy Yoakum Guthrie,  
19 III, defendants.

20 I am going to read counts 1 through 12,  
21 read or summarize, and we will later summarize count  
22 13 at a later point.

23 "Introduction.

24 "The Grand Jury charges:

25 "From in and around December, 1973 up to

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3412

2 and including the date of the filing of this Indict-  
3 ment" -- and I think it would be agreed that that occurred  
4 January 9, 1976 -- "in the Southern District of New  
5 York and elsewhere, MICHAEL S. GARDNER (also known as  
6 S. Michael Gardner and as S. M. Gardner, and herein-  
7 after called 'GARDNER') and SUSAN M. BRAUNIG (also  
8 known as Mrs. Susan M. Gardner and as S. M. Gardner,  
9 and hereinafter called 'BRAUNIG'), defendants, together  
10 with SY YOAKUM GUTHRIE III (hereinafter called 'GUTHRIE'),  
11 defendant in Counts 7 through 12 of this indictment  
12 ment, and also together with others known and unknown  
13 to the Grand Jury (hereinafter called 'confederates'),  
14 unlawfully, wilfully and knowingly did devise and intend  
15 to devise schemes and artifices to defraud and to  
16 obtain money and property from victims such as Arthur  
17 White and White Holdings Ltd. (Counts 1 and 4), L. Ross  
18 Allen and Porklean Farms Ltd. (Counts 2, 3 and 4), Bar-  
19 clay's Bank of New York (Counts 5 and 6), Fun Tyme  
20 Packages Inc. (Counts 7 and 8), Myrtle Rupe (Counts  
21 9, 10, 11 and 12), and retail stores, banks, and other  
22 commercial enterprises (Count 13) by means of false and  
23 fraudulent pretenses, representations and promises in  
24 the form of 'advance fee' schemes and related schemes  
25 also involving false and fictitious names and titles

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2 and false, forged and spurious checks, instruments,  
3 and obligations.

4 "(A) It was part and pattern of the ad-  
5 vance fee schemes and artifices to defraud that:

6 "GUTHRIE" -- who I might parenthetically  
7 note is charged only in connection with the Fun Tyme  
8 and Rupe matters -- "and other confederates would  
9 bring victims, in the form of persons and businesses  
10 in need of rapid and substantial financial assistance,  
11 to GARDNER, who would be introduced as an international  
12 financial consultant having ready access to large-scale  
13 financing from major foreign and domestic sources.

14 GARDNER, purporting to act as the 'agent' of undisclosed  
15 principals or in the name of companies such as Ekalb  
16 Investments Inc. and Penguin Products Company (which  
17 were actually mere shells), would promise to obtain  
18 rapidly for the victims major loans, letters of credit,  
19 permanent refinancing, or other forms of financial  
20 assistance from, through, or by means of major insur-  
21 ance companies, Swiss banks, Canadian, German and  
22 Panamanian corporations, European exchanges, and such  
23 entities. In return for such financial assistance,  
24 which the defendants and their confederates repeatedly  
25 assured the victims would be immediately forthcoming,

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2 the victims were required to make certain payments,  
3 of which thousands of dollars were required to be paid  
4 in advance. These advance fees, ranging from \$5,000  
5 to \$25,000 and more, were required to be paid to GARDNER  
6 in the form of certified checks or other readily  
7 negotiable instruments.

8 "GARDNER, BRAUNIG, GUTHRIE and their con-  
9 federates had no honest expectation that the promised  
10 financial assistance would or could be obtained and  
11 had neither the capacity nor the intention to obtain  
12 it. Rather, the advance fees were immediately cashed  
13 or deposited into various personal bank accounts, in-  
14 cluding accounts opened by BRAUNIG falsely posing as  
15 GARDNER's wife, and the proceeds were then immediately  
16 spent on primarily personal uses, including payments  
17 secretly funneled by GARDNER to the benefit of GUTHRIE  
18 and other confederates as their shares of the proceeds  
19 of the fraudulent schemes.

20 "Thereafter, GARDNER, BRAUNIG, GUTHRIE,  
21 and their confederates, having spent the advance fees,  
22 put off the demands of the victims by avoiding meeting  
23 or talking with them whenever possible, by claiming  
24 that there had been unavoidable or unforeseeable delays  
25 or that further monies were needed to meet unfore-

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2 seen expenses, and by employing other such ruses to  
3 cover their fraud. In the end, GARDNER, BRAUNIG,  
4 GUTHRIE, and their confederates never delivered any  
5 of the promised financial assistance and never returned  
6 any of the advance fees, but claimed instead that the  
7 deals had broken down because of some noncompliance,  
8 misrepresentation or failing on the part of the victims  
9 or of third parties that also precluded any repayment  
10 of the advance fees.

11 "As GARDNER, BRAUNIG, GUTHRIE and their  
12 confederates well knew, their aforesaid pretenses,  
13 representations, and promises were false and fraudulent  
14 confidence schemes intentionally designed to defraud  
15 the victims of their advance fees and to conceal the  
16 fraud.

17 " (B) It was part and pattern of the  
18 related schemes and artifices to defraud involving false,  
19 forged and spurious checks, instruments and obligations  
20 that:

21 "GARDNER and BRAUNIG, with the aid of their  
22 confederates, would open accounts in both individual and  
23 corporate names (such as the fictitious name S. M.  
24 Gardner and the fraudulent enterprise Ekab Investments,  
25 Inc.) at the Metropolitan Trust Company in Canada and

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2 the Barclay's Bank of New York, and would acquire  
3 blank checks, instruments, and obligations (collec-  
4 tively referred to as 'instruments') of said  
5 institutions and gain access to their services and  
6 facilities, which they would use for the commission  
7 of frauds upon said institutions.

8 "Among other frauds, GARDNER would falsely  
9 and fraudulently complete the front sides of instru-  
10 ments of the Metropolitan Trust Company, using false,  
11 fictitious, forged and spurious account numbers, account  
12 names, and signatures, and making said instruments pay-  
13 able to the defendant BRAUNIG, who would then endorse  
14 these instruments on their backs and deposit them into  
15 an account in her own name at Barclay's Bank of New  
16 York. Thereafter, BRAUNIG, taking advantage of the  
17 extended delay foreseeable in the use of the inter-  
18 national mails by Barclay's Bank and its agents in the  
19 clearing and collection of these instruments, would  
20 fraudulently urge Barclay's Bank to credit her account  
21 with the face amounts of said instruments and would  
22 withdraw these amounts from her account prior to the  
23 time that Barclay Bank learned that these instruments  
24 were false and spurious.

25 "(C) It was part and pattern of the related

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2 schemes and artifices to defraud involving false and  
3 fictitious names and titles that:

4 "MICHAEL S. GARDNER having assumed the name  
5 'S. Michael Gardner', SUSAN M. BRAUNIG would falsely  
6 and fraudulently assume the name of 'Susan M. Gardner',  
7 and both would fraudulently assume the name 'S. M. Gardner.'  
8 Further, GARDNER would falsely pose as an international  
9 financial consultant having ready access to large-scale  
10 financing, and BRAUNIG would falsely and fraudulently  
11 pose as GARDNER's wife, secretary, administrative  
12 assistant, business partner, and the like, as the occa-  
13 sion demanded, and would assume falsely and fraudulently  
14 such titles as 'Mrs.', 'Office Manager,' 'Administrative  
15 Assistant to President,' and the like. By the use  
16 and with the aid of these assumed names and titles and  
17 the illusion of substance and respectability thereby  
18 created, GARDNER and BRAUNIG not only conducted, pro-  
19 moted, and carried on the advance fees schemes and  
20 false instrument schemes hereinabove described but also  
21 fraudulently arranged for the extension of credit from  
22 retail stores, banks, and other commercial enterprises,  
23 for the purpose of defrauding them and of conducting  
24 other unlawful business.

25 "Counts One Through Four.

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2 "The Grand Jury further charges" --  
3 and here I am summarizing for you -- the defendants  
4 Gardner and Braunig, for the purpose of executing the  
5 scheme ; alleged in the instruction -- and here I am  
6 referring to counts 1 through 4 -- in particular the  
7 advance fee schemes relating to Arthur White, White  
8 Holdi ;s, L. Ross Allen and Porklear Fams Ltd., caused  
9 a letter from Penguin Products to L. Ross Allen to be  
10 placed in the mails in violation of the mail fraud  
11 statute, caused certain telephone calls from Gardner  
12 in New York to Allen in Canada and between Gardner and  
13 Braunig in New York and Allen in Canada to be made  
14 in violation of the wire fraud statute, and transported  
15 a \$25,000 check from White from Canada to New York  
16 in violation of the travel fraud statute.

17 The indictment itself will give you the  
18 detailed charges.

19 Moving to counts 5 and 6, which I have  
20 undertaken to summarize, the defendants Gardner and  
21 Braunig, for the purpose of executing in particular  
22 the scheme relating to defrauding of Barclays Bank of  
23 New York by means of false, forged and spurious checks,  
24 caused Barclays Bank of New York and its agents to  
25 send through the mails for collection two fraudulent

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2 checks, Government's Exhibits 56A and 56B in evi-  
3 dence, in violation of the federal mail fraud statute.

4 Counts 7 and 8 -- again I am summarizing --  
5 the grand jury charges the defendants Gardner, Braunig  
6 and Guthrie, for the purpose of executing in particu-  
7 lar the advance fee scheme relating to Fun Tyme  
8 Packages, Inc., did cause a particular letter from  
9 Gardner to Mark Parker in Mineola to be placed in the  
10 mails in violation of the federal mail fraud statute  
11 and did cause a cable from Mr. Vigevani in Switzerland  
12 to be sent by wire to the Bank of New York in New  
13 York in violation of the federal wire fraud statute.

14 And counts 9 through 12, which I am summarizing,  
15 the defendants Gardner, Braunig and Guthrie, for the  
16 purpose of executing in particular the advance fee  
17 scheme relating to Myrtle Rupe, caused two telephone  
18 conversations between Gardner in New York and Rupe in  
19 Oklahoma City, one telephone conversation between Guthrie  
20 in New York and Rupe in Oklahoma City, to be  
21 transmitted in violation of the federal wire fraud  
22 statute and caused or induced Myrtle Rupe to travel  
23 in interstate commerce in connection with a scheme to  
24 defraud her of \$5000 or more in violation of the  
25 federal travel fraud statute.

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2 I am going to summarize count 13 briefly  
3 a little bit later.

4 As I have told you, the indictment will  
5 be made available to you to take into the jury room  
6 when you begin your deliberations.

7 Why don't we interrupt here and take a few  
8 minutes' break and then we will resume and finish.  
9 Don't talk about the case, please.

10 Lead the jury out.

11 (The jury left the courtroom.)

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2 (Jury in box.)

3 THE COURT: I am going to turn first to that  
4 portion of the indictment which contains the 12 counts  
5 that charge violations of Federal anti-fraud statutes,  
6 that is, laws passed by Congress which are generally  
7 referred to as the mail fraud, the wire fraud and the  
8 travel fraud statutes. The introductory wording of  
9 these statutes as they pertain to all but the first of  
10 these counts, which I will deal with later, is identical  
11 and reads:

12 "Whoever, having devised or intending to  
13 devise any scheme or artifice to defraud, or  
14 for obtaining money or property by means of false  
15 or fraudulent pretenses, representations or  
16 promises ..."

17 And then from that point on the statutes differ. One  
18 statute in pertinent part continues by making it a crime  
19 when any person:

20 "for the purpose of executing such scheme  
21 or artifice, or attempting to do so, places in any  
22 post office or authorized depository for mail,  
23 matter ... to be sent or delivered by the Postal  
24 Service, or takes or receives therefrom, any such  
25 matter ... or knowingly causes to be delivered

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2 by mail ... any such matter ..."

3 This is the mail fraud statute. In short, the use of  
4 the mails in furtherance of a fraudulent scheme is  
5 prohibited.

6 A separate statute, using the same introductory  
7 language as to a scheme or artifice to defraud, makes it  
8 a criminal offense when one:

9 "... transmits or causes to be transmitted by means  
10 of wire, radio or television communication in inter-  
11 state or foreign commerce, and writings, signs,  
12 signals, pictures, or sounds for the purpose of  
13 executing such scheme or artifice."

14 This is the wire fraud statute, and the  
15 language referred to extends generally to the interstate  
16 or foreign use of such facilities as telephones, telegrams  
17 and cables.

18 And still another statute with respect to such  
19 fraudulent schemes makes it a criminal offense when anyone:

20 "Transports or causes to be transported,  
21 or induces any person to travel in, or to be  
22 transported in interstate commerce in the execution  
23 or concealment of a scheme or artifice to defraud  
24 that person of money or property having a value of  
\$5000 or more."

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2 This is the travel fraud statute.

3 The indictment charges violations of each  
4 of these statutes, depending upon whether it involves  
5 the use of the mails, telephone, telegrams, cables or  
6 travel in the alleged execution or furtherance of a  
7 scheme to defraud.

8 Another Federal statute also comes into play,  
9 known as the Aiding and Abetting Law, which provides that  
10 a person who "aids, abets, counsels, commands, induces  
11 or procures the commission of any offense against the  
12 United States is equally punishable as the person who  
13 commits the offense."

14 Under the aiding and abetting law, a person  
15 who wilfully causes an act to be done which, if directly  
16 performed by him or another would be an offense against  
17 the United States, is punishable just as if he himself did  
18 the act.

19 Later I shall instruct you as to this law in  
20 more detail.

21 In short, the crime with which the defendant  
22 Gardner is charged in each of the first 12 counts of the  
23 indictment, and with which the defendant Guthrie is charged  
24 in each of Counts 7 through 12 of the indictment, involves  
25 doing an act or causing or abetting or aiding someone else

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2 to do an act, such as using the mails or interstate  
3 wire facilities, or travelling in interstate commerce,  
4 in order to execute one of the schemes to defraud out-  
5 lined in the Introduction in the indictment. Please keep  
6 in mind that the offense charged against the defendant  
7 Gardner in Count 1 is somewhat different from the other  
8 counts. I will have a brief word on that. Now, the  
9 mail fraud, wire fraud and travel fraud statutes contain  
10 the same elements, except, of course, the mail fraud  
11 statute involves the use of the mails, the wire fraud  
12 statute involves interstate or international use of  
13 telephone, telegrams, or cables, and the travel statute  
14 involves interstate travel by a victim, all in execution  
15 or furtherance of the alleged scheme to defraud. In  
16 order to find that either the defendant violated the mail  
17 fraud, wire fraud or travel fraud statutes in connection  
18 with the particular counts in which he is charged, the  
19 government must prove beyond a reasonable doubt the  
20 following essential elements:

21 One, that a scheme or artifice to defraud or  
22 to obtain money by false and fraudulent pretenses,  
23 representations or promises, as alleged in the indictment,  
24 existed.

25 Two, that the defendant you are considering

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2       knowingly and wilfully participated in the scheme or  
3       artifice to defraud, with knowledge of its fraudulent  
4       nature and with intent to defraud; and

5               Three, that as to each count the defendant  
6       you are considering either used or caused the use of the  
7       mails, or the use of interstate or international wire  
8       facilities, or the interstate travel by a victim specified  
9       in the particular count, in execution or furtherance of  
10      the scheme charged in connection with the particular count  
11      you are considering.

12               Let us consider each element separately.

13               The first element: scheme or artifice to  
14      defraud --

15               The first element of the offense charged in  
16      each of the fraud counts is the existence of a scheme or  
17      artifice to defraud. A "scheme or artifice" is a plan  
18      for the accomplishment of an object. A scheme or artifice  
19      to defraud is any plan, device or course of action intended  
20      to deceive others and to obtain money or property from  
21      such persons by means of false or fraudulent pretenses,  
22      representations or promises calculated to deceive persons  
23      of average prudence and comprehension.

24               A statement, representation, claim or document  
25      is false or fraudulent if it was material and if it was

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2 untrue when made and the person making it or causing it  
3 to be made knew it to be untrue or deliberately blinded  
4 himself to the knowledge that it was false, and if it  
5 was made or caused to be made with the intent to deceive.

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2 Now, the fraud prohibited by the statute is not  
3 limited to active misrepresentation. A fraudulent scheme  
4 may exist although no express misrepresentation or fact is made.  
5 The deceitful concealment of material fact or the deceitful  
6 representation of half truths may also constitute an actual  
7 fraud, and the devising of a scheme for obtaining money or  
8 property by such half truths or concealment or by creating a  
9 false impression is in violation of the statutes. If there  
10 is deception, the manner in which it is accomplished is im-  
11 material.

12 I instructed that the law does not require that  
13 the government prove all the pretenses, misrepresentations or  
14 concealments charged in the indictment. It is sufficient  
15 as to any count if the government proves beyond a reasonable  
16 doubt that at least one pretense, misrepresentation or conceal-  
17 ment of material fact was made in furtherance of a scheme to  
18 defraud as charged in that count. However, you must be  
19 persuaded beyond a reasonable doubt of the actual existence  
20 of the scheme or artifice to defraud which is charged.

21 In this regard, I charge you that it is not necessary  
22 that you find that any scheme actually succeeded, or that a  
23 defendant realized any gain at all from any scheme. Nor is  
24 it necessary for the government to establish that the victim  
25 suffered any loss.

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2                   The crime charged is the scheme, and not the  
3 result of the scheme.

4                   Likewise, since the devising of a scheme or  
5 artifice concerns a defendant's conduct and intent, should  
6 you find that, as charged, a scheme to defraud existed, it  
7 is no defense that the victims themselves may have made in-  
8 accurate representations or entered into agreements that they  
9 could not fulfill.

10                  The second element that the government must prove  
11 beyond a reasonable doubt as to each of the fraud counts  
12 in order to convict a defendant is that the defendant you  
13 are considering participated in the scheme or artifice to  
14 defraud charged in connection with that count, that he became  
15 a party to it knowingly, willfully and with intent to defraud.

16                  "Knowingly" means to act purposely and deliberately,  
17 rather than through mistake, inadvertence or other innocent  
18 reason.

19                  "Willfully" means to act voluntarily and inten-  
20 tionally, and with specific intent to do something the law  
21 forbids, that is to say, to act with the purpose either of  
22 disobeying or disregarding the law.

23                  "Intent to defraud" means to act knowingly and  
24 with the specific intent to deceive for the purpose of either  
25 causing some financial loss to another and/or bringing about

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2 financial gain to one's self.

3 Fraudulent intent is one of the essential elements  
4 of the offenses with which the defendants are charged.

5 Fraudulent intent is not presumed or assumed; it is personal  
6 and not imputed. One is chargeable with his own personal  
7 intent, not the intent of some other person. Good faith  
8 constitutes a complete defense to one charged with an offense  
9 of which fraudulent intent is an essential element. One who  
10 acts with honest intention is not chargeable with fraudulent  
11 intent. One who expresses an opinion honestly held by him,  
12 or a belief honestly entertained by him, is not chargeable  
13 with fraudulent intent, even though such opinion is erroneous  
14 and such belief is a mistaken belief. Evidence which  
15 establishes only that a person has made a mistake in judgment  
16 or an error in management, or was careless, does not establish  
17 fraudulent intent. In order to establish fraudulent intent  
18 on the part of the person, it must be established by the  
19 government that such person knowingly and intentionally  
20 attempted to deceive another.

21 At the same time, it is no defense that a defendant,  
22 knowing that his representations were false or that his  
23 actions were fraudulent, spoke or acted out of a belief  
24 that ultimately everything would work out so that no one  
25 would suffer any monetary loss. Nor is it a defense that

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2 a defendant first made his representations in good faith if  
3 later, at any time charged within the period covered by the  
4 indictment, he realized the representations were false, yet  
5 deliberately continued to make them.

6 However, if you should find that at the time a  
7 representation was made it was then true and correct, the  
8 mere fact that thereafter circumstances changed, making that  
9 representation later untrue, would not warrant a verdict of  
10 guilty.

11 In order to sustain the charges against a defen-  
12 dant, the government must establish beyond a reasonable  
13 doubt that the defendant you are considering knew that his  
14 conduct as a participant in the scheme was calculated to  
15 deceive potential victims, and nonetheless he willfully  
16 associated himself with an alleged fraudulent scheme with a  
17 specific intent to defraud. If you find that with respect  
18 to any count charged a defendant did not act with a specific  
19 intent to defraud, then you may not convict that defendant  
20 as to that count, regardless of whether you approve or  
21 disapprove of any other motive or the actions of that defen-  
22 dant.

23 You may find that a defendant had actual knowledge  
24 of falsity of statements alleged to have been misrepresenta-  
25 tions if you find beyond a reasonable doubt that the defendant

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3431

2 you are considering acted with a deliberate disregard of  
3 whether the statements were true or false and with a con-  
4 scious purpose to avoid learning the truth. However, as  
5 I have charged you, mere knowledge of another's plans to  
6 defraud is not sufficient to convict either defendant, if  
7 you do not find beyond a reasonable doubt that the defendant  
8 you are considering himself intended to defraud.

9 Also, mere association with others involved in  
10 such a scheme does not establish that a defendant himself  
11 participated in the scheme.

12 There has been some discussion in this case of the  
13 role of a "finder." "Finder" is a term that is often used  
14 synonymously with "broker." A finder can be a person who  
15 brings parties to a financial or commercial transaction  
16 together and receives a fee for doing so. There is nothing  
17 illegal or improper, per se, about a person working as a  
18 finder in the financial world.

19 Now, in determining whether either defendant  
20 knowingly and willfully and with the intent to defraud  
21 committed the offenses with which he is charged, issues of  
22 fact are presented, and clearly these issues concern what is  
23 in one's mind.

24 It has been stated frequently that you bring into  
25 the jurybox the common sense and the experience of your daily

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2 lives. Obviously, it is not always possible to ascertain or  
3 prove directly the operation of the mind, or the intention of  
4 a defendant. You cannot look into his mind to see what his  
5 intentions were, but you are able to consider all the facts  
6 and circumstances shown by the evidence and exhibits in  
7 this case, and to draw your own conclusions with a reasonable  
8 degree of accuracy as to what, if anything, the intentions  
9 of either of the defendants were.

10 Intent involves a mental attitude. From evidence  
11 of particular actions coupled with evidence of surrounding  
12 circumstances, one may choose to draw certain conclusions.  
13 In other words, proof of the circumstances surrounding a  
14 person's actions, if found to exist, can supply an adequate  
15 basis for finding that a defendant acted knowingly and  
16 willfully.

17 While I am discussing this issue of a defendant's  
18 intent or state of mind, let me remind you that there was  
19 certain evidence which was admitted during the trial as  
20 bearing on the issue of intent with respect to one or the  
21 other of the defendants. Let me discuss that evidence with  
22 you now.

23 You have heard evidence which may lead you to  
24 believe that the defendant Gardner was involved in one or  
25 more alleged incidents and that the defendant Guthrie was

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2       involved in one alleged incident, which incidents are said  
3       by the government to be similar to the acts with which each  
4       of these defendants is charged in the indictment in this case.

5               The evidence of this type relating to the defendant  
6       Gardner is that relating to the alleged World Wide Securities  
7       matter and the arrest of Susan Braunig in Canada in connec-  
8       tion with certain fraudulent check charges. The evidence of  
9       this type relating to the defendant Guthrie is regarding  
10       dealings he had with a man named Edward Fucillo.

11               It is for you, the jury, in considering this  
12       evidence, to determine whether it shows misconduct on the  
13       part of the defendant alleged to have been involved and  
14       whether it is evidence of an act or acts similar to the acts  
15       charged here. I instruct you, however, that this evidence  
16       is not to be considered by you in determining whether either  
17       defendant committed the acts charged in the indictment in  
18       this case or for any other purpose, unless you first find  
19       that the other evidence which you have heard standing alone  
20       establishes beyond a reasonable doubt that the defendant  
21       you are considering committed the acts charged in this  
22       indictment. If you find beyond a reasonable doubt, based  
23       solely on the evidence other than the alleged similar act or  
24       acts, that either defendant did commit the acts charged in  
25       the indictment, then you may consider evidence of the alleged

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2 similar act or acts of that defendant to whatever extent you  
3 wish in determining the state of mind, motive, or intent  
4 with which the defendant you are considering did the acts in  
5 this case which you have found to have occurred. If you  
6 find that a similar act has been established by the govern-  
7 ment as to either defendant, then you may draw an inference,  
8 though you are under no obligation to do so, that in doing  
9 the acts charged in the indictment the defendant you are  
10 considering acted in this case knowingly and intentionally,  
11 and not because of mistake or accident or other innocent  
12 reason.

13 In no event are you to consider this evidence as  
14 bearing on the character or disposition of either defendant.  
15 I remind you also that you are not to consider any similar  
16 act which you find to have been established as to one defen-  
17 dant as evidence against the other defendant for any purpose.

18 Now, the government has also offered certain  
19 evidence against the defendant Guthrie, which it contends  
20 is evidence that the defendant made false exculpatory state-  
21 ments when questions by the grand jury. If you find that  
22 when questioned by the grand jury the defendant Guthrie gave  
23 false statements in an attempt to exonerate himself, you may  
24 consider such statements as circumstantial evidence from  
25 which consciousness of guilt or criminal intent may be

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3435

2       inferred. Whether or not the evidence of the defendant  
3       Guthrie's statements points to a consciousness of guilt, the  
4       significance, if any, to be attached to any such evidence are  
5       matters for your determination. I caution you that evidence  
6       of such statements by the defendant Guthrie, should you find  
7       them to have been made, is binding only on the defendant who  
8       actually made the statements, and any such statement cannot  
9       be considered by you for any purpose as against the defendant  
10      Gardner.

11       To conclude on the second element, knowledge of  
12      falsity and a specific intent to defraud or deceive on the  
13      part of the defendant you are considering is an essential  
14      element of the crimes chargeed in the first 12 counts of the  
15      indictment. Accordingly, if you find that a defendant  
16      lacked such knowledge and intent, or that he acted in good  
17      faith, this would be a defense, and you should acquit that  
18      defendant.

19       If you find that the government has established  
20      beyond a reasonable doubt not only the first element, that  
21      there was a scheme to defraud, that also the second element,  
22      that a defendant was a knowing participant in such a scheme  
23      and acted with a specific intent to defraud, then you must  
24      go on and consider whether the government has also estab-  
25      lished the third element, as to which I am about to instruct

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3436

2 you, in order to determine whether you have a sufficient  
3 basis upon which to convict that defendant as to the count  
4 you are considering.

5 The third element which the government must prove  
6 beyond a reasonable doubt as to each of the first 12 counts  
7 is sometimes called the jurisdictional element. This differs  
8 as to each of the three statutes involved in these 12 counts.  
9 I will instruct you separately on this third element under  
10 the mail fraud, wire fraud, and travel fraud statutes.

11 First, as to the mail counts, counts 2, 5, 6  
12 charged against the defendant Gardner, and count 7 charged  
13 against both defendants:

14 Before a defendant may be found guilty as to these  
15 counts, the government must also prove beyond a reasonable  
16 doubt that in furtherance of the scheme to defraud, the  
17 defendant you are considering did use the mails or cause the  
18 mails to be used in connection with the matter referred to  
19 in the particular counts you may be considering.

20 Unlike the case of wire fraud, which I will discuss  
21 in a minute, it is not necessary to show that the mail travel  
22 in interstate or foreign commerce.

23 Here, the counts in question -- counts 2, 5, 6  
24 and 7-- refer to letters which, the government contends,  
25 was sent through the mails from New York to, respectively,

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3437

2 St. Catherines, Toronto, Montreal and Mineola in furtherance  
3 of the alleged schemes set forth in the respective counts.

8-4 4 Where one does an act with knowledge that the use  
5 of the mails will follow in the ordinary course of business,  
6 or where such use of the mails can reasonably be foreseen  
7 even though not actually intended, then he causes the mails  
8 to be used. Thus, while use of the mails in furtherance of  
9 a scheme to defraud is an essential element of the mail  
10 fraud charges, it is not necessary to show that the defendant  
11 in question actually mailed any item referred to. It is  
12 sufficient if you find that a defendant caused the mailing  
13 by others -- and this does not require that the defendant  
14 himself specifically authorized others to do the mailing or  
15 specifically intended that the mails be used. Further, the  
16 mailed matter need not disclose on its face a fraudulent  
17 representation, an intent to defraud, or that it was mailed  
18 in furtherance of a scheme to defraud. It may appear wholly  
19 innocent. But it is necessary that the evidence establish  
20 beyond a reasonable doubt that the matter in question was  
21 willfully caused to be mailed -- as I have defined that for  
22 you -- by the defendant you are considering to help carry  
23 out the execution of the scheme to defraud alleged in the  
24 indictment with respect to the particular count you may be  
25 considering.

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2 The government must also establish beyond  
3 a reasonable doubt that the particular mailing charged  
4 in each of these four counts occurred during the existence  
5 of the alleged scheme charged in the count and in its  
6 furtherance.

7 If the scheme had entirely ended prior to  
8 the mailing or in no way depended upon the mailing  
9 to effect its fraudulent purpose, then the jurisdictional  
10 element has not been supplied.

11 Turning next to the wire fraud counts,  
12 that is, counts 3 and 4, charged against the defendant  
13 Gardner, and counts 8, 9, 11 and 12 charged against  
14 both Gardner and Guthrie, to sustain its charge that a  
15 defendant is guilty of the wire fraud counts, the  
16 government has to prove, in addition to the two common  
17 essential elements I have previously mentioned as to  
18 all of the first 12 counts, that for the purpose of  
19 executing the fraudulent scheme or artifice the defendant  
20 caused the transmission of sounds and signals by wire  
21 communication in interstate or foreign commerce or caused  
22 such use of interstate or foreign wire facilities by  
23 another person.

24 I instruct you that interstate or foreign  
25 telephone calls, telegrams, Telexes and cables con-

3439

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2 stitute the use of wire communication within the meaning  
3 of the statute.

4                   Here counts 3 and 4 relate to alleged phone  
5 calls between Gardner in New York and Ross Allen in  
6 Ontario, Canada. Count 8 relates to an alleged  
7 cable from Vigevani in Switzerland to the Bank of New  
8 York in New York. Counts 9, 11 and 12 relate to  
9 alleged telephone calls between Gardner and Guthrie  
10 in New York and Myrtle Rupe in Oklahoma City.

11                   As with the mails, if you find beyond a  
12 reasonable doubt that a defendant caused interstate  
13 telephone calls to be made or telegrams to be sent in  
14 furtherance of a scheme to defraud, the evidence  
15 need not establish that that defendant himself directly  
16 participated in any telephone conversation or himself  
17 sent any telegram or cable or even had specific knowledge  
18 of the wire communication. It is sufficient if you  
19 find that the defendant caused such communication  
20 directly or indirectly. Under the wire fraud statute  
21 there is no requirement that the accused know that the  
22 instrumentalities of interstate communication are used  
23 or that he foresee that such instrumentalities may be  
24 used.

25                   The remaining two of the first 12 counts

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2 are counts 1 and 10, the so-called travel fraud counts.

3 Let's consider first count 10, charged against both  
4 Gardner and Guthrie.

5 In addition to the first two elements  
6 common to all the counts, to establish that either de-  
7 fendant is guilty of the offense set forth in count  
8 10, the government must prove beyond a reasonable doubt  
9 that that defendant, for the purpose of executing a  
10 scheme to defraud a person of \$5000 or more, induced  
11 that person to travel in interstate commerce or caused  
12 someone else to induce such travel.

13 Now, to induce simply means to cause a per-  
14 son to do something, to persuade, or to influence, or  
15 to stimulate action on the part of another person.  
16 There is no requirement under the travel fraud statute  
17 that the accused specifically know, foresee or intend  
18 that a person would be induced to travel in inter-  
19 state commerce. It is enough if you find that the  
20 defendant knowingly participated in a scheme which  
21 by its nature involved interstate travel and that  
22 such travel actually did occur.

23 In this indictment, count 10 relates to  
24 alleged travel by Myrtle Rupe from Oklahoma City to  
25 New York which the government charges was directly in-

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3441

2 duced by Gardner pursuant to a scheme in which Guthrie  
3 was his co-schemer and in which Mrs. Rupe was de-  
4 frauded of \$14,000.

5 Count 1 of the indictment, which is charged  
6 only against the defendant Gardner, charges the transpor-  
7 tation of a \$25,000 certified check by Gardner from  
8 Niagara Falls, Canada, to New York, New York. This  
9 count differs slightly from the 11 other so-called fraud  
10 counts charged in the indictment because the offense  
11 alleged in count 1 is encompassed by a different sub-  
12 paragraph of Section 2314 of Title 18. That is the  
13 statute which I have called the travel fraud statute.

14 And this provision reads in pertinent part  
15 as follows:

16 "Whoever transports in interstate or foreign  
17 commerce any securities or money of a value of  
18 \$5000 or more, knowing the same to have been taken by  
19 fraud," is guilty of a crime.

20 Under this provision of the law as it  
21 applies to the facts of this case, in order to find  
22 the defendant Gardner guilty on count 1 the government  
23 must prove beyond a reasonable doubt, first, that the  
24 security or money was taken by fraud, namely, pursuant  
25 to a scheme or artifice to defraud which existed as

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2 alleged in the indictment.

3                   Second, that the defendant you are con-  
4 sidering participated in such a scheme knowingly,  
5 wilfully and with intent to defraud, as I have defined  
6 those terms to you; and,

7                   Third, that the security or money was  
8 transported by the defendant or was caused to be  
9 transported by him in interstate or foreign commerce and  
10 was of a value of \$5000 or more.

11                  In this regard, I instruct you that a check  
12 is a security within the meaning of this statute.

13                  I instruct you that it does not matter if  
14 a specific transaction is alleged in the indictment  
15 to have occurred on or about a certain date and the  
16 testimony indicates that in fact it was on another date.  
17 The law only requires a substantial similarity between  
18 the dates alleged in the indictment and the dates  
19 established by the testimony.

20                  Nor is it required that the government prove  
21 that the alleged schemes to defraud started and ended  
22 on the dates alleged in the indictment. It is  
23 sufficient if you find that in fact an alleged scheme  
24 to defraud existed at some time within that period.

25                  Now, count 13 of the indictment charges

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2 the defendant Gardner with having violated or with  
3 having aided and abetted Susan Braunig to violate  
4 Title 18, United States Code, Section 1342, which is  
5 commonly called the fictitious names statute.

6 Let me just tell you something about 1342  
7 and then give you a comment and give you a brief  
8 word on aiding and abetting.

9 1342 reads in pertinent part:

10 "Whoever for the purpose of conducting,  
11 promoting or carrying on by means of the Postal  
12 Service, any scheme or device mentioned in Section 1341  
13 of this title (that is the mail fraud statute) or any  
14 other unlawful business, uses or assumes, or requests  
15 to be addressed by, any fictitious, false or assumed  
16 title, name. . . or names other than his own proper  
17 name (commits a crime)."

18 Count 13 charges, and I am summarizing  
19 it for you, that for the purpose of executing the  
20 scheme set forth in the indictment by means of the  
21 Postal Service and of defrauding certain stores, banks  
22 and commerce enterprises, the defendants Gardner and  
23 Braunig used assumed, false and fictitious names and  
24 titles. The particulars of this charge are set forth  
25 in the indictment.

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2                   In order to find the defendant Gardner guilty  
3 of the crime charged in count 13, you must find that  
4 the government has proven the following two essential  
5 elements beyond a reasonable doubt:

6                   First, that during the period of time alleged  
7 in the indictment the defendant Gardner used or aided  
8 and abetted Miss Braunig in the use of any of the  
9 names and titles specified in the instruction and in  
10 count 13, such as S. Michael Gardner, Mrs. Susan M.  
11 Gardner and S. M. Gardner, and that these names and  
12 tit . . . were not his or her own proper name or title  
13 but were false, fictitious or assumed.

14                  Second, that the defendant Gardner used  
15 or aided and abetted Miss Braunig in the use of one  
16 or more of these names or titles for the purpose of  
17 conducting, promoting or carrying on by use of the mails  
18 any mail fraud scheme or any other unlawful business  
19 set forth in the indictment.

20                  For example, the government charges that  
21 Miss Braunig with Gardner's help falsely posed as Gardn-  
22 ner's secretary, assistant and wife and that, using  
23 the name of Mrs. Gardner, she was able to give an  
24 appearance of substance and respectability that enabled  
25 her to open numerous credit accounts on which she there-

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2 after defaulted.

3                   The use of an assumed or fictitious name  
4                   or title by an individual is not a crime in itself.  
5                   It may become criminal to use an assumed name or title  
6                   only if in using that name it is done for a fraudulent  
7                   purpose.    Such use or holding out of an assumed name  
8                   becomes a crime in terms of the statute we are con-  
9                   sidering when it is done for the purpose of carrying  
10                  out by use of the mails a scheme to defraud or other  
11                  unlawful business.

12                  Since the only unlawful businesses charged  
13                  in this indictment are the various schemes to defraud  
14                  set out in the introduction in the various counts, you  
15                  must find beyond a reasonable doubt all the elements  
16                  of one or more of the schemes charged in counts 1 through  
17                  12 before you can make a judgment on count 13.    Then,  
18                  in addition, you must find beyond a reasonable doubt  
19                  each of the two further elements of the crimes as I have  
20                  just described them to you before you can convict the  
21                  defendant Gardner of count 13.

22                  In this regard, I charge you that merely  
23                  being in debt or owing money in the absence of any  
24                  fraudulent scheme or purpose is not a crime and is not  
25                  what the defendant Gardner is charged with in count

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2 13 of this indictment.

3 I have mentioned that each of the defend-  
4 ants is charged with aiding and abetting certain of the  
5 other defendants in the commission of the crimes with  
6 which each of the defendants is charged.

7 The aiding and abetting statute passed by  
8 the Congress provides as follows:

9 "Whoever commits an offence against the  
10 United States or aids or abets or counsels, commands  
11 or induces or procures its commission, is punishable as  
12 a principal."

13 Under this statute it is not necessary for  
14 the government to show that a defendant himself physically  
15 committed the crime with which he is charged in order  
16 for you to find the defendant guilty. A person who  
17 aids or abets another person to commit an offense is  
18 just as guilty of that offense as if he committed it  
19 himself. Accordingly, you may find either defen-  
20 ant guilty of any of the offenses with which he is  
21 charged if you find beyond a reasonable doubt with re-  
22 spect to the particular count and defendant you are  
23 considering that the government has proved that another  
24 person actually committed the offense with which the  
25 defendant is charged, and that the defendant aided or

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2 abetted that person in committing that offense.

3 As you can see from the language of the  
4 law, the first requirement is that you find that another  
5 person has committed a crime against the United States.  
6 Obviously one cannot be held responsible for criminal  
7 acts of another if no crime was committed by the other  
8 person in the first place, but if you do find that a  
9 crime was committed, then you must consider whether the  
10 defendant you are considering aided and abetted the  
11 commission of a crime.

12 In order to aid or abet another person to  
13 commit a crime, it is necessary that the accused person  
14 wilfully and knowingly associated himself in some way  
15 with the crime charged and that he wilfully and knowingly  
16 did seek by some act to help make the crime succeed.

17 I have already explained to you the meaning  
18 of the words "wilfully and knowingly." Please remem-  
19 ber that the mere presence of a defendant where a crime  
20 is being committed, even coupled with knowledge by the  
21 defendant that a crime is being committed, or the  
22 mere negative acquiescence by a defendant in the  
23 criminal conduct of other people even with guilty knowl-  
24 edge is not sufficient to establish aiding and abetting.  
25 An aider and abettor must have some interest in the

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2 criminal venture.

3                   To determine whether a defendant aided or  
4 abetted the commission of the offense with which  
5 he is charged in the indictment, ask yourself these  
6 questions: Did he participate in the crime charged  
7 as something he wished to bring about? Did he  
8 associate himself with the criminal venture knowingly  
9 and wilfully? Did he seek by his action to make the  
10 criminal venture succeed? If he did, then he is  
11 an aider and abettor and therefore guilty of the  
12 offense you have found to have been committed; and if  
13 he didn't, then he is not guilty of the offense you  
14 are considering.

15                   Now, this completes my instructions to you  
16 with respect to the elements which you must find that  
17 the government has proved beyond a reasonable doubt  
18 before you may convict either defendant on any of the  
19 counts with which he is charged.

20                   I remind you that as to any one count, if  
21 you find that the government has not proved each of  
22 the elements I have described beyond a reasonable doubt  
23 as to the defendant you are considering, then it is your  
24 duty to acquit that defendant as to that count.

25                   On the other hand, if you find that with

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2 respect to any count the government has proved each  
3 of the required elements beyond a reasonable doubt with  
4 respect to the defendant you are considering, then it  
5 is your duty to convict that defendant as to the crime  
6 charged in that count.

7 Now, I have described the charges contained  
8 in each of the 13 counts in the indictment against the  
9 defendant Gardner and the six counts in the indictment  
10 against the defendant Guthrie, and I have outlined  
11 the essential elements of those counts. I ask you to  
12 note that a separate crime or offense is charged in  
13 each count of the indictment. Each charge against  
14 each defendant and the evidence pertaining to it should  
15 be considered separately. The fact that you find  
16 a defendant guilty or not guilty as to one of the offenses  
17 charged should not control your verdict as to the other  
18 offenses charged against the same defendant.

19 Likewise, the fact that you find one de-  
20 fendant guilty or not guilty as to any particular charge  
21 should not control your verdict as to the other defend-  
22 ant.

23 Also, you are not to consider or in any  
24 way speculate about the sentence which a defendant may  
25 receive if found guilty. It is the function of the

3450

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2 jury to deliberate and determine whether a defendant  
3 is guilty or not guilty on the basis of the evidence  
4 and the instructions of the Court, and it is the function  
5 of the judge to determine the disposition of the  
6 defendant's case thereafter.

7 Well, the most important part of the case  
8 is the part which you now, as jurors are about to play  
9 because it is you who will have to decide whether the  
10 defendants Gardner and Guthrie are guilty or not guilty  
11 of the counts charged. I know that you will try  
12 the issues that have been presented to you according  
13 to the oath which you have taken as jurors, and if you  
14 remember, in that oath you promised that you would well  
15 and truly try the issues joined in this case and a true  
16 verdict render. If you follow that oath and try the  
17 issues without confusing your thinking with emotions,  
18 you will arrive at a just verdict.

19 As you deliberate, please be careful to  
20 listen to the opinion of other jurors as well as to  
21 ask for an opportunity to express your own view.  
22 No one juror holds the center of the stage in the jury  
23 room; no one juror controls or monopolizes deliberations.  
24 You must all express your views and exchange views.  
25 If you become convinced that your original view was

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2 wrong with respect to any matter, don't be afraid to  
3 change your vote because of pride in your original opinion  
4 or in reaction to the stubbornness of another person.

5 On the other hand, do not surrender your  
6 honest belief solely because of the opinion of your  
7 fellow jurors or because you are outnumbered.

8 You understand that in a criminal case  
9 in this court your verdict on each count as to each  
10 defendant charged must be unanimous, that is, it must  
11 be joined in by each and every one of you. The form  
12 of the verdict as to each defendant will be either  
13 guilty or not guilty on each count of the indictment  
14 with which each defendant is charged.

15 If you wish, if you arrive at a verdict  
16 of either guilty or not guilty on some counts although  
17 not all counts, you may send in a note indicating that  
18 and we will take your verdict accordingly.

19 During your deliberations, you may send  
20 for any exhibits in evidence that you wish to see. You  
21 may request that any testimony be read back to you or  
22 that any tapes in evidence be replayed. You may re-  
23 quest any portion of this charge to be read back to you.  
24 You will receive a copy of the indictment to be taken  
25 into the jury room. Remember that it is not evidence.

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3452

2 All of your requests must be in writing.

3 Finally, you are instructed that you must  
4 not reveal the standing of the jurors at any time  
5 during your deliberations, that is, you are not to  
6 indicate the split of any vote on any count for any  
7 verdict to anyone, including the court.

8 Now, Madam Forelady, lead the jury out for  
9 a few minutes. I have to discuss a couple of matters  
10 with the lawyers. We will call you right back in.

11 Don't talk about the case or start deliberat-  
12 ing yet.

13 (The jury left the courtroom.)

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